IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. [redacted] Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener.*

Brief of the California Defendants in Support of Their Motion to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming

(See List of Attorneys on Inside Cover)

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT OF JURISDICTION

The four States of Colorado, New Mexico, Utah and Wyoming, which this motion seeks to join as necessary parties, are subject to the jurisdiction of this Court both as to service of process and venue, and the joinder of such States will not deprive the Court of original jurisdiction

over the parties under Article III, Section 2, Clause 2, of the Constitution of the United States.

RULES, TREATIES, INTERSTATE COMPACTS AND STATUTES INVOLVED

Rules

Rule 9 of the Revised Rules of the Supreme Court provides in part:

> "2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

Rule 21 of the Federal Rules of Civil Procedure provides:

> "*Misjoinder and nonjoinder of parties.*—Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

Rule 19 of the Federal Rules of Civil Procedure provides:

> "*Necessary joinder of parties.*—(a) *Necessary joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
>
> "(b) *Effect of failure to join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without

depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

"(c) *Same—Names of omitted persons and reasons for non-joinder to be pleaded.* In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

Compact, Statutes, Treaty

The Colorado River Compact (H. Doc. 717, 80th Cong., 2d Sess., p. A17 (1948)). The full text appears in Appendix No. 1 to the Answer of the California Defendants to Arizona's Bill of Complaint. The provisions of that Compact primarily involved are quoted in the Statement of the Case.

The Boulder Canyon Project Act (Act of Dec. 21, 1928, 45 Stat. 1057). The full text of this statute appears in Appendix No. 2 to the Answer of the California Defendants to Arizona's Bill of Complaint. The provisions of that statute primarily involved are quoted in the Statement of the Case.

The California Limitation Act (Calif. Stats. 1929, Ch. 16, p. 38). The full text of that statute appears in Appendix No. 3 to the Answer of the California Defendants to Arizona's Bill of Complaint.

The Presidential Proclamation of June 25, 1929 (46 Stat. 3000). The full text of this proclamation appears in Ap-

pendix No. 4 to the Answer of the California Defendants to Arizona's Bill of Complaint.

The Mexican Water Treaty (U. S. Treaty Ser. No. 994, 59 Stat. 1219 (1945); H. Doc. 717, 80th Cong., 2d Sess. p. A831 (1948)). The full text of this Treaty appears as Appendix No. 29 of the Answer (in Volume II of the Appendixes).

The Upper Colorado River Basin Compact (Act of April 6, 1949, 63 Stat. 31) among the States of Arizona, Colorado, New Mexico, Utah and Wyoming. The full text of that Compact is printed as Appendix No. 30 of the Answer (Volume II of the Appendixes).

STATEMENT OF THE QUESTION PRESENTED

The question presented by this motion is:

Are the States of Colorado, New Mexico, Utah and Wyoming necessary parties to this action?

STATEMENT OF THE CASE

1. The Record to Date

The State of Arizona, invoking the original jurisdiction of this Court pursuant to the provisions of Article III, Section 2, Clause 2 of the Constitution of the United States, filed a motion for leave to file a bill of complaint in August, 1952, seeking certain equitable relief against the State of California and seven public agencies of California. Arizona's motion for leave to file was granted on January 19, 1953. The California Defendants answered the bill of complaint averring, among other things, four affirmative defenses (filed May 19, 1953). Arizona replied (filed August 28, 1953) and California made rejoinder (filed October 7, 1953).

On December 31, 1952, the United States of America filed a motion to intervene, which was granted (344 U.S. 919, Jan. 19, 1953). Subsequently the United States filed

a petition in intervention (December 8, 1953) which was answered by Arizona (February 11, 1954) and the California Defendants (April 5, 1954).

On December 14, 1953, the State of Nevada filed a motion to intervene and a petition in intervention. Arizona in effect demurred (filed February 5, 1954), and the California Defendants made answer (filed April 5, 1954). Following the granting of Nevada's motion to intervene by this Court on June 1, 1954, (*Arizona* v. *California,* 98 L. ed. (Advance p. 720), 1954), Arizona made answer (filed July 14, 1954).

By Order entered June 1, 1954 (*Arizona* v. *California,* 98 L. ed. (Advance p. 720), 1954), this Court appointed George I. Haight, Esquire, of Chicago, Illinois, as Special Master in this cause.

On July 15, 1954, the California Defendants filed the present motion to join as necessary parties the States of Colorado, New Mexico, Utah and Wyoming. On the same date the California Defendants filed a motion for leave to file an amended answer to Arizona's bill of complaint and also filed an amendatory answer. On August 13, 1954, Arizona filed its response to the motion of the California Defendants to join the four named States.

2. The Relief Prayed by the Parties

ARIZONA

In its bill of complaint the State of Arizona prays, among other things, that its title to the annual beneficial consumptive use of 3,800,000 acre-feet of the waters of the Colorado River System (alleged to have been apportioned to the Lower Basin by the Colorado River Compact, and to consist of 2,800,000 acre-feet of the 7,500,000 acre-feet the use of which was apportioned by Article III(a), and all of the additional 1,000,000 acre-feet of uses referred to in Article III(b) of the Compact), be forever confirmed and quieted as against the Defendants, subject to certain rights in New Mexico and Utah, and that the Defendants be enjoined from asserting any claim to the contrary;

that the title of California to the annual beneficial consumptive use of waters of the Colorado River System apportioned by the Colorado River Compact to the Lower Basin be forever fixed and limited at 4,400,000 acre-feet; that, as to surplus waters unapportioned by the Colorado River Compact, the Court decree that when and if there is a further apportionment of such waters to the Lower Basin the State of California be entitled to one-half and the State of Arizona to the remainder less one-twenty-fifth to Nevada and less the undefined rights of Utah and New Mexico; that a decree be entered establishing that the beneficial consumptive use of water apportioned by the Colorado River Compact be measured in terms of man-made depletion of the virgin flow of the main stream; and that losses of water from reservoirs located on the main stream in the Lower Basin be charged against Arizona and California in proportion to their use of water stored in such reservoirs. To further these claims, Arizona seeks certain interpretations of the Colorado River Compact and the Boulder Canyon Project Act, related laws, contracts and documents.

California

In their answer the California Defendants deny the major allegations of the State of Arizona, and assert, among other things, the affirmative defenses that the Defendants have the right to the beneficial consumptive use of 5,362,000 acre-feet per annum of water of the Colorado River System under the Colorado River Compact, the Boulder Canyon Project Act, a Statutory Compact between the United States and California, and the water storage and delivery contracts of the United States executed pursuant thereto; that Arizona is estopped and precluded from asserting the interpretations of the laws and documents asserted in her bill of complaint; and that the Defendants have appropriative rights to the beneficial consumptive use of not less than 5,362,000 acre-feet of

Colorado River System water per annum as against all other parties.

Nevada

The State of Nevada, in its petition of intervention, seeks to quiet title to 539,100 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact; to reserve for future agreement the disposition of the use of 1,000,000 acre-feet referred to in Article III(b) of the Colorado River Compact and to assure to Nevada the ultimate beneficial consumptive use of not less than 900,000 acre-feet per annum, from all classes of water.

The United States

The United States of America, in its petition of intervention, asserts claims "as against the parties to this cause" of rights to the use of water in the Colorado River and its tributaries for the maximum legal demands of all projects in the Lower Basin to their full capacity for diversion, carrying and storage; to fulfill its obligations arising from its international treaties or conventions; to fulfill all of its contracts to deliver water and electric power; to fulfill the obligations emanating from its status as trustee for the Indians and Indian tribes; to protect its interests in fish and wildlife, flood control and navigation; and for use of the National Park Service, Bureau of Land Management, and Forest Service. The United States further alleges that these claims of Arizona and California far exceed the quantity of water apportioned to the Lower Basin of the Colorado River by the Colorado River Compact, and a resolution of the controversy between the parties "may therefore infringe upon the interests of the United States to its detriment". The United States claims rights to "annual diversions" in the Lower Basin for Indian uses in the amount of 1,747,250 acre-feet, and 76,000 acre-feet for fish and wildlife projects. The amounts of the other Federal claims are not stated.

The issues which involve the States of Colorado, New Mexico, Utah and Wyoming in this controversy arise primarily from the Colorado River Compact, which their representatives and those of Arizona, California, and Nevada signed on November 24, 1922, subject to ratification by the legislatures of all seven States and the consent of Congress, and from the Boulder Canyon Project Act, which granted the consent of Congress thereto upon certain conditions, which have themselves become the subject of controversy.

3. The Colorado River Compact

The agreement signed at Santa Fe in November 1922 was the resultant of two forces. One was the Lower Basin's imperative necessity for the construction of a great storage dam, a drive rooted in the need for flood and silt protection for the Palo Verde Valley and Imperial Valley, (the latter lying 300 feet below sea level) and projects in Arizona along the lower river; the need for stored water to replace natural flow which was being taken away from senior appropriators in California by junior appropriators in other parts of the Basin; and the need for an All-American Canal to replace the canal then serving the Imperial Valley via a route through Mexican territory. The counter-force was the demand of Colorado, New Mexico, Utah and Wyoming for protection against the law of appropriation. The Compact was negotiated in the light of the then recent decision of *Wyoming* v. *Colorado,* 259 U. S. 419 (1922), which applied the doctrine of "first in time, first in right" regardless of State lines. The four upper States knew that irrigators in Arizona and California, in the period 1877-1910, had already appropriated and were now using all the natural flow of the river, and that the junior appropriations in the Upper Basin were dependent upon the construction of storage works, either in their basin or below. (California's answer to Arizona's complaint, par. 3)

The Compact, in short, was the price paid by the Lower Basin to the Upper for acquiescence in the construction of Hoover Dam.

Pertinent Provisions of the Compact

The Colorado River Compact deals, not merely with the main stream of the Colorado River, but with the "Colorado River System", which it defines in Article II(a):

> "The Colorado River System means that portion of the Colorado River and its tributaries within the United States of America."

This definition includes the Gila River System in Arizona as well as the eight other major tributary systems which, all together, constitute the Colorado River System.

As Arizona's Complaint correctly states (par. VII), "The Compact did not apportion water of the Colorado River System among the signatory States. Instead, it apportioned the beneficial consumptive use of stated quantities of water to the Upper Basin and the Lower Basin respectively."

It did more, however.

The Compact recognizes *rights* to the beneficial consumptive *use* of water in terms of "Basins"; *obligations,* with respect to the *delivery* of water, in terms of "Divisions". "Divisions" and "Basins" are defined as follows in Article II:

> "(c) The term 'States of the Upper Division' means the States of Colorado, New Mexico, Utah and Wyoming.
>
> "(d) The term 'States of the Lower Division' means the States of Arizona, California and Nevada.
>
> * * *
>
> "(f) The term 'Upper Basin' means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee

Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

"(g) The term 'Lower Basin' means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry."

The four States named in the present motion thus constitute the "States of the Upper Division". But the "Upper Basin" includes portions of these States and a part of Arizona.

Two of the absent States, Utah and New Mexico, have areas (and rights) within the Lower Basin, together with Arizona, California, and Nevada; but only the three last named are "States of the Lower Division".

The *rights* of both Upper and Lower *Basins* are stated in Articles III(a) and III(b):

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

"(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum."

These rights are stated in terms of "use", not in terms of flow of the stream; in terms of demand, not in terms of supply. They apply to the waters of the Colorado River System, including the waters of all of its tributaries, not merely the waters of the main stream.

The term "beneficial consumptive use" is not defined. The *obligations* of the two *Divisions* are stated in Articles III(c), III(d) and III(e):

> "(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).
>
> "(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this Compact.
>
> "(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

Unlike the statement of rights in Article III(a) and III(b), these obligations are stated in terms of water, not use of water; in terms of supply, not in terms of demand. They relate to the flow at one place, Lee Ferry on the main stream, unlike Articles III(a) and III(b), which deal with uses throughout the Colorado River System, on the tributaries as well as on the main stream.

The Compact does not purport to deal with the use of all of the waters available in the System, but provides in Articles III(f) and III(g):

"(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

"(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to The President of the United States of America, and it shall be the duty of the Governors of the signatory States and of The President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America."

These provisions are permissive, not mandatory. There may or may not be another Compact in the future, and if one is negotiated, the parties may or may not conform to this pattern.

Throughout the Colorado River System certain protective provisions apply, stated in Articles VII and VIII:

"ARTICLE VII

"Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."

ARTICLE VIII

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the

Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

Article XI provides that the Compact shall be binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States.

4. Arizona's Rejection of the Compact

The equilibrium supposedly established in November 1922 between the Lower States and the Upper, between the present parties to this suit and the four absent States, collapsed in less than three months. The legislature of Arizona rejected the Compact. (Answer to Arizona's complaint, par. 18) The legislatures of the other six States ratified it.

The needs for flood protection, water and electric power in the Lower Basin continued to increase. In 1923 Los Angeles commenced surveys on the Colorado River aqueduct and in 1924 filed appropriations on the waters of the Colorado River. (Answer to Arizona's complaint, par. 45, and Exhibit A thereto)

Ratification by the Other States of a Six-State Compact: 1925-1929

Between 1925 and 1929, the Legislatures of California, Colorado, Nevada, New Mexico, Utah and Wyoming, abandoning hope of Arizona's ratification, enacted legislation, proposed by Colorado, reciprocally waiving the provisions of Article XI of the proposed Colorado River Compact (which made the Compact effective when ap-

proved by the Legislatures of seven states), and enacting that the Compact should become effective when six states should have ratified it and the Congress should have given its consent. It was submitted for the consent of Congress in that form. (Answer to Arizona's complaint, par. 19)

5. The Boulder Canyon Project Act

(Act of Dec. 21, 1928, 45 Stat. 1057)

On December 21, 1928, the President approved the Boulder Canyon Project Act. (Appendix No. 2) This statute, insofar as the present controversy is concerned, (1) authorized construction of a dam (now known as Hoover Dam) and power plant in Black Canyon or Boulder Canyon in the Colorado River, on the Arizona-Nevada boundary, and the All-American Canal to carry water into the Imperial and Coachella Valleys in California, adjacent to the Mexican border, (2) granted the consent of Congress to the Colorado River Compact on certain conditions, more particularly described below, (3) subjected the rights and operations of the United States to the Compact, (4) directed that no person should have the use of stored waters except pursuant to contracts with the Secretary of the Interior, and authorized him to make such contracts, and (5) specified the purposes for which the dam and its reservoirs should be used.

Alternative Consent to Seven-state or Six-state Compact by Congress

The Project Act superimposed new features in granting the consent of Congress to the Compact. It granted that consent to the Compact either as a seven-state agreement, or, in the alternative, as a six-state compact, conditioned, in the latter event only, upon the enactment by California of a statute in specified terms. Power was designated to the President to proclaim, after the expiration of six months, the effectuation and existence of either the seven-

state compact or the alternative six-state compact, but not both. The language of the statute in this respect reads:

> Sec. 4(a). (Par. 1): "This Act shall not take effect * * * unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

(Paragraph 2 of this section authorized a compact among Arizona, California and Nevada, but it was not consummated.)

> Sec. 13 (a). "The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, * * * is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided."

Sections 13 (b, c, d) of the Act subjected the United States and all those claiming under it to the Colorado River Compact.

6. The Statutory Compact Between the United States and California

The Quantities Involved

The further restriction with which the California legislature was thus confronted was a serious one. California, in the present action, alleges that as of the date of signing the Compact (Nov. 24, 1922) her valid appropriations exceeded 6,000,000 acre-feet per annum, and that "present perfected rights" of projects then constructed and in operation in California required the beneficial consumptive use of more than 4,500,000 acre-feet per annum (Answer to Arizona's Complaint, par. 4), which had increased to 4,950,000 acre-feet at the effective date of the Project Act (June 25, 1929; Answer to Arizona's Complaint, par. 28). The limitation proposed by Congress was 4,400,000 acre-feet per annum of the waters apportioned by Article III(a) plus not to exceed "one-half of the excess or surplus waters unapportioned by the Colorado River Compact". It omitted reference to the 1,000,000 acre-feet referred to in Article III(b), and the legislative history of the Project Act made it clear that Congress did not intend to exclude

California from participation in that "increase of use", but considered this quantity as part of the "excess or surplus waters unapportioned by the Compact", available "for use in California". The term "consumptive use" was defined as "diversions less returns to the river." The minimum requirements for beneficial consumptive use of the Palo Verde Valley, in which irrigation had been carried on since 1877, of the All-American Canal areas whose appropriative rights dated from 1893, and of the proposed Colorado River Aqueduct to the coastal plain, were known to aggregate about 5,400,000 acre-feet per annum. The limitation, if accepted, would require the abandonment of plans for California's other meritorious projects. (Answer to Arizona's Complaint, par. 28, 37.) Such a limitation had to be agreed to as the additional price for authorization of the dam and canal if Arizona continued to refuse to ratify the Seven-State Compact, but not if Arizona ratified. California's legislature provided for both contingencies.

California's Acceptance

The Legislature of California ratified the proposed Colorado River Compact both as a seven-state compact and as a six-state compact. (Calif. Stats. 1929, Ch. 1, p. 1; Stats. 1929, Ch. 15, p. 37; see Stats. 1929, Ch. 16, p. 38.) In a separate statute the California Legislature, in response to the first paragraph of Section 4(a) of the Boulder Canyon Project Act, on March 4, 1929, enacted a statute (Stats. 1929, Ch. 16, p. 38; sometimes referred to as the California Limitation Act, Appendix 3) to become effective only upon the ratification of the Colorado River Compact by six States, and its non-ratification by the seventh State (Arizona) within six months from December 21, 1928, and proclamation of the latter event by the President.

Proclamation of The Six-State Compact and Limitation Act by the President

On June 25, 1929 the President of the United States proclaimed that (a) seven States had not ratified the Colorado River Compact within six months from the date of the approval of the Boulder Canyon Project Act, but that (b) six states (including California) had ratified the compact and consented to waive the provisions of Article XI thereof requiring seven-state approval, as prescribed in Section 13 (a) of the Boulder Canyon Project Act; (c) that California had met the requirements set out in the first paragraph of Section 4 (a) of the Boulder Canyon Project Act necessary to render that act effective on six-state approval of the compact, and (d) all prescribed conditions having been fulfilled, the Boulder Canyon Project Act was effective June 25, 1929. (Appendix 4; 46 Stat. 3000.)

The Terms of the Resulting Statutory Compact

California alleges (Answer to Arizona's Complaint, par. 27) and Arizona denies (Reply to California's Answer, par. 27, 59); that upon the President's proclamation on June 25, 1929, the Boulder Canyon Project Act and the California Limitation Act thus established, by reciprocal legislation, a Statutory Compact between the United States and California which, on the one hand, restricted California's uses to the limits therein stated, but on the other hand authorized the United States to contract to presently deliver, and the defendants to receive, water from storage sufficient to make possible the beneficial consumptive use of the full quantities stated in the Statutory Compact. California says that these comprise the aggregate annual beneficial consumptive use of not to exceed:

(1) Four million four hundred thousand acre-feet of the waters apportioned to the Lower Basin by Article III (a) of the Colorado River Compact, plus

(2) One-half of all excess or surplus waters not apportioned by Article III(a) of the Colorado River Compact, including in said excess or surplus the waters referred to in Article III(b) of said Compact.

As previously noted, the absent States, together with Arizona and Nevada, are named as beneficiaries of this Statutory Compact.

7. The Boulder Canyon Project Contracts: Statutory Provisions

Section 4(b) of the Boulder Canyon Project Act required the Secretary of the Interior, before constructing Hoover Dam and the All American Canal, to obtain contracts which would assure revenues to repay their cost.

Section 5 of the Project Act authorized the Secretary of the Interior to contract for the storage and delivery of water, and for the disposition of electric energy, in the following terms:

> "That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic uses, and generation of electrical energy * * * upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of Section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of Section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

Section 6, Paragraph 1, governing the use of Hoover Dam and reservoir, provided in part as follows:

> "That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power * * * "

California's "present perfected rights", as previously stated, are alleged to be 4,950,000 acre feet as of June 25, 1929. (Answer to Arizona's Complaint, par. 28)

The Seven Party Agreement

In 1931, at the instance of the Secretary of the Interior, the State of California recommended an apportionment among California public agencies of such waters as might be available under the Colorado River Compact and the Statutory Compact (Answer, par. 32; Appendix 10). The total was held within 5,400,000 acre-feet (5,362,000) per annum, which represented the minimum requirements of the Palo Verde Valley, All American Canal and Metropolitan areas on the coastal plain. A number of meritorious California projects were thereby excluded, in consequence of the Limitation Act. The Secretary of the Interior approved the allocation and promulgated it in regulations (Appendix 8). The seven public agencies recognized therein are the seven co-defendants of the State of California in this action.

The Contracts

Contracts were made in 1930 and 1931 between the United States and the California defendants (tabulated in paragraphs 34 and 35 of their Answer to Arizona's Complaint, and printed as appendixes to that Answer), assuring the United States the revenues required by Section 4 of the

Project Act, and providing for the delivery, from storage to be provided by Hoover Dam, pursuant to Sections 5 and 6 of the Project Act, of the quantities required to make possible the beneficial consumptive use in California of not to exceed 5,362,000 acre-feet per annum. Hoover Dam and the All-American Canal were constructed by the United States. The Colorado River Aqueduct was built by the Metropolitan Water District. (See Petition of Intervention of the United States, Appendix I-A) The California defendants allege that altogether they have undertaken firm obligations to the United States or have themselves built works to utilize the water covered by their contracts, at a cost exceeding five hundred million dollars. (Answer to Arizona's Complaint, par. 1) These projects are summarized in paragraph 2 of California's Answer to Arizona's Complaint, and in Exhibits A, B, and C to that Answer. It is through these projects that the seven co-defendants, signatories to the Seven Party Agreement, are served.

The United States subsequently entered into contracts in 1942 and 1944 with Nevada (Appendix VIA, VIB, to the Petition of Intervention of the United States) for the delivery of not to exceed 300,000 acre-feet per annum, and in 1944 with Arizona (Exhibit C to Arizona's Bill of Complaint) for the delivery of the quantities required to make possible the beneficial consumptive use of not to exceed 2,800,000 acre-feet per annum of Colorado River System water.

8. Litigation

The equilibrium between the present parties and the four absent States—established in 1922 by signature of the seven-state compact, destroyed by Arizona's rejection of that compact in 1923, reestablished in 1929 by the Six-State Compact and the California Limitation Act—wavered again in 1930. Arizona was no better satisfied with the new compact than with the old, and brought three successive actions in this Court to upset it, in 1930, 1934, and 1935. In all of them she joined all of the other six States as defendants.

On October 13, 1930, Arizona instituted an action (*Arizona* v. *California, et al.*, 283 U.S. 423 (1931)), to enjoin the construction of the Hoover Dam and All-American Canal, to declare the Boulder Canyon Project Act unconstitutional, and to invalidate the Colorado River Compact. On motion of the defendants the bill of complaint was dismissed.

On February 14, 1934, Arizona moved for leave to file a bill to perpetuate the testimony of the negotiators of the Colorado River Compact. (*Arizona* v. *California, et al.*, 292 U.S. 341 (1934).) The Court denied the motion for leave to file.

In October, 1935, Arizona filed a motion for leave to file a Bill of Complaint against the States parties to the Six-State Colorado River Compact praying an equitable apportionment, which motion was denied. (*Arizona* v. *California, et al.*, 298 U.S. 558 (1936).)

The present action, consequently, is the fourth in which the Court has been asked by Arizona to pass upon the meaning of the Colorado River Compact and the Boulder Canyon Project Act. It is the first in which Arizona has seen fit not to join the States other than California.

9. Arizona's Ratification of the Seven-State Compact; 1944

Fifteen years after enactment of the Project Act and the California Limitation Act, on February 24, 1944, the Legislature of Arizona enacted a statute entitled "An Act ratifying the Colorado River Compact; and declaring an emergency." (Sess. L. Ariz. 1944, pp. 427-428.)

That legislation was accompanied and followed by assertions by Arizona of interpretations of the Colorado River Compact, reversing those which she had stated to this Court in the preceding cases. It is these new interpretations that she seeks to enforce in this suit.

In brief, they have the effect of transforming Article III(a) of the Colorado River Compact from an apportionment of the uses of the waters of the entire Colorado River

System to an apportionment of the virgin flow of the main stream only. This would be accomplished primarily by (1) excluding the uses on the Gila River System from the operation of Article III(a) and physically identifying them as an apportionment of the waters specified in Article III(b);[1] (2) identifying the uses apportioned to the Lower Basin by Article III(a) with the waters delivered under Article III(d) at Lee Ferry by the States of the Upper Division, and (3) reducing the debit for Arizona's uses by more than 1,000,000 acre-feet through the technique of measuring the consumptive uses, particularly on the Gila, not at the places where the water is consumed, but by the estimated depletion which such uses would cause in the virgin flow of the main stream.[1] There are a number of other important issues, but Arizona's case insofar as the Upper Basin States are concerned, is essentially based upon this conversion of the Colorado River Compact from a System-wide agreement to a main-stream agreement, coupled with a denial by Arizona of the right of any State to acquire appropriative rights in unapportioned water, except as the result of a new compact, to be made after October 1, 1963; that is to say, with Arizona's consent. (The decree Arizona seeks here would presumably control the negotiators of that compact: complaint, prayer, par. 4, p. 30)

10. The Mexican Water Treaty

On February 3, 1944 the United States executed a treaty with Mexico relating to the waters of the Rio Grande, Colorado, and Tijuana Rivers. On April 18, 1945, the Senate of the United States consented thereto, with reservations, and the same was ratified, effective as of November 8, 1945 (Treaty Series 994; Appendix 29 to California's Answer). The performance of this treaty, as to the Colo-

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[1] Compare with the contemporary interpretation of the Colorado River Compact asserted by Arizona in *Arizona* v. *California, et al.*, 283 U.S. 423 (1931); Appendix 28 to California's Answer to the present case.

rado River System, will require the guaranteed delivery, "from any and all sources," of 1,500,000 acre-feet of water per annum at the Mexican boundary, subject to reduction in the event of "extraordinary drought or serious accident to the irrigation system in the United States", in the "same proportion as consumptive uses in the United States are reduced." (Art. 10) The treaty (Art. 1(j)) defined "consumptive use" in terms consistent with the Project Act (Sec. 4a).

11. Upper Colorado River Basin Compact

By the Act of April 6, 1949, (63 Stat. 31) the Congress granted its consent to a compact (Appendix 30) among Arizona, Colorado, New Mexico, Utah and Wyoming apportioning the water available to the Upper Basin under the Colorado River Compact, defined as the compact proclaimed effective by the President June 25, 1929. The legislative report accompanying that legislation stipulates that the United States, by giving such consent, does not thereby commit itself to any interpretation therein expressed or implied with respect to the Colorado River Compact (H. Rep. 270, on HR 2325, 81st Cong., 1st Sess.)

12. Issues in the Present Case

The issues in the present case, as California sees them, are stated in a "Summary of the Controversy", which is annexed as Exhibit A to the present motion.

The issues are serious. If Arizona's prayers were granted, California's rights would be reduced to the beneficial consumptive use of 3,800,000 acre-feet per annum, measured by consumption at place of use, or 3,000,000 acre-feet measured in terms of "depletion of the virgin flow of the main stream" (present Motion, Exhibit A, p. 8). This is a great deal less than the rights which California owned and could supply from natural flow prior to the construction of Hoover Dam.

The respects in which these issues involve the absent States and necessitate their presence in this action are stated in the following argument.

SUMMARY OF ARGUMENT

The presence in this case of the four absent parties to the Colorado River Compact is necessary to an effective conclusion of the Colorado River controversy.

No effective decree determining the rights to the use of water in the Lower Basin can be made unless it be first ascertained what quantities are legally available to the Lower Basin. This requires a determination of the obligations of the States of the Upper Division to deliver water at Lee Ferry, as well as their rights to use water as areas within the Upper Basin, since the waters upon which the decree will operate in the Lower Basin have, as their principal source, the waters arriving at Lee Ferry.

The same language of the Colorado River Compact which controls rights and obligations in the Lower Basin controls those in the Upper Basin, and the Upper Basin States are consequently affected by a decree construing that disputed language.

New Mexico and Utah have a dual interest, on the one hand as States of the Upper Division and Upper Basin, and on the other hand as States entitled to a portion, as yet undetermined, of the waters available to the Lower Basin as a whole. An effective division of the waters available *en bloc* to five States cannot be made in the absence of two of them.

Arizona claims rights as a third-party beneficiary of the Statutory Compact between the United States and California evidenced by the Boulder Canyon Project Act and the California Limitation Act. Colorado, Nevada, New Mexico, Utah and Wyoming are co-beneficiaries. This Statutory Compact came into existence only as an accompaniment, required by Congress, to a Six-State Compact, in consequence of Arizona's refusal to ratify a Seven-State

Compact. The six states ratified the Compact (1925-1929) under certain well understood interpretations. Arizona purported to ratify the Seven-State Compact fifteen years thereafter, upon new interpretations. The six parties to the Six-State Compact are all necessary parties to a determination of whether their agreement has thus been supplanted by a Seven-State agreement, and, if so, what its interpretation shall be, and whether the Statutory Compact between the United States and California remains in force. If it does remain in force, all of the co-beneficiaries are necessary parties to a decree construing their rights thereunder.

The United States asserts claims to the waters of the Colorado River System which are independent of, and adverse to, not only the rights of the present parties, but of all of the States of the Colorado River Basin. Most prominent of these is a large claim to the use of water made on behalf of Indians. All of the parties to the Colorado River Compact are necessary parties to a determination of whether this Indian claim and other federal claims to the beneficial consumptive use of water are outside of the Colorado River Compact and superior to the rights governed by that Compact, or whether the federal uses are chargeable to the Basin, and to the State, in which they occur, and a determination of the effect of these claims on the rights of the States to which they are adverse.

ARGUMENT

I

ALL ABSENT PARTIES MUST BE JOINED WHERE THEIR PRESENCE IS NECESSARY FOR A FULL AND EFFECTIVE SETTLEMENT OF THE CONTROVERSY.

A. The Rules of Court and the Federal Rules of Civil Procedure.

Under Rule 9 of the new Revised Rules of the Supreme Court, effective July 1, 1954, the form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and "in other respects those rules, where their application is ap-

propriate, may be taken as a guide to procedure in original actions in this Court."

On July 15, 1954, the California Defendants filed a motion to join, as parties to the present controversy, the States of Colorado, New Mexico, Utah and Wyoming pursuant to the procedure set forth in Rule 21 of the Federal Rules of Civil Procedure, which provides:

> "*Misjoinder and nonjoinder of parties.*— . . . Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just . . . ."

The requirements for compulsory joinder of parties under the Federal Rules of Civil Procedure are stated in Rule 19, which provides:

> "*Necessary joinder of parties.*—(a) *Necessary joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
>
> "(b) *Effect of failure to join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

Rule 19 has been construed merely to codify the existing federal law of necessary and/or indispensable parties under federal practice prior to the adoption of the Federal Rules of Civil Procedure. *Metropolis Theatre Co.* v. *Barkhausen,* 170 F. 2d 481, 485 (7th Cir. 1948), *cert. denied,* 336 U. S. 945 (1949); *Young* v. *Garrett,* 149 F. 2d 223, 228 (8th Cir. 1945); *United States* v. *Washington Institute of Technology,* 138 F. 2d 25, 26 (3d Cir. 1943); *Cather* v. *Ocean Accident & Guaranty Corp.,* 94 F. Supp. 511, 514 (D. Neb. 1950); *Field* v. *True Comics,* 89 F. Supp. 611, 613 (S.D.N.Y. 1950); 3 MOORE, FEDERAL PRACTICE, Par. 19.05 (2d ed. 1948).

This court in cases of original jurisdiction under Article 3, Section 2, Clause 2 of the Constitution has framed its proceedings on the question of parties in accordance with a developing body of federal precedents and held these precedents binding even where their application defeated the original jurisdiction. *California* v. *Southern Pacific Co.,* 157 U. S. 229 (1895); *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199 (1902); *New Mexico* v. *Lane,* 243 U. S. 52 (1917).

B. The test of "necessary" parties.

Cited by the court in *California* v. *Southern Pacific Co., supra,* as authority for cases of original jurisdiction, was the leading case of *Shields* v. *Barrow,* 17 How. 130 (U. S. 1855). It defined "necessary parties" as:

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the Court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties . . . ." (p. 139)

This rule as to necessary parties has been followed in subsequent decisions by the court, *Railroad Company* v. *Orr,* 18 Wall. 471 (U. S. 1873), *McArthur* v. *Scott,* 113 U. S.

340 (1885), *Gregory* v. *Stetson,* 133 U. S. 579 (1890), *Commonwealth Trust of Pittsburgh* v. *Smith,* 266 U. S. 152 (1924), and appears to have been incorporated in the definition of necessary parties found in subdivision (b) of Rule 19 of the Federal Rules of Civil Procedure as those:

> "who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties . . . ."

Where absent parties are found to be necessary, they must be joined to the suit when they are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it. Federal Rules of Civil Procedure, Rule 19(b); See *Williams* v. *Bankhead,* 19 Wall. 563, (U. S. 1874); *Barney* v. *Baltimore,* 6 Wall. 280 (U. S. 1868).

C. The further test of "indispensability".

If jurisdiction over those qualifying as necessary parties cannot be obtained, or if the joinder of such parties would destroy the court's jurisdiction over the parties before it, the court must then make the further determination of whether they are so "indispensable" as to require dismissal of the suit. The *Shields* case defined an indispensable party as:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." (p. 139)

This rule as to indispensable parties has been uniformly followed as the guiding test. *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U. S. 77 (1920); *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199 (1902); *Barney* v. *Baltimore,* 6 Wall. 280 (U. S. 1868); *Northern Indiana*

R.R. v. *Michigan Central R.R.*, 15 How. 233 (U. S. 1854); *Mallow* v. *Hinde*, 12 Wheat. 193 (U. S. 1827). Where absent parties are found to be indispensable this Court has uniformly held that no adjudication can be made and the action must be dismissed. *Shields* v. *Barrow*, 17 How. 130 (U. S. 1855); *California* v. *Southern Pacific Co.*, 157 U. S. 229 (1895); *Arizona* v. *California*, 298 U. S. 558 (1936).

D. Since the absent parties are within the court's jurisdiction, the question is whether they are "necessary", not whether they are "indispensable".

The four absent States of Colorado, New Mexico, Utah and Wyoming will be affected so directly and materially by a resolution of the issues raised in the pleadings among the present parties to the controversy, for the reasons hereafter shown, that they would qualify as indispensable parties if such a determination were required. However, since the four States are subject to the jurisdiction of this court both as to service of process and venue, and their joinder will not deprive the court of its original jurisdiction over the parties, a determination of indispensability is not required under the federal law of compulsory joinder. The absent States must be joined as long as they qualify as "necessary" parties. Accordingly, the only question that need be decided on this motion is whether the States of Colorado, New Mexico, Utah and Wyoming are necessary parties to this litigation.

E. The absent States are necessary parties.

Colorado, New Mexico, Utah and Wyoming must be joined as necessary parties if "complete relief" is to be accorded between those presently parties to the controversy. They must also be joined as necessary parties because their rights are at issue in this suit and should not be determined in their absence. The issues which materially and directly affect the absent States so as to require

their joinder are identified and summarized in the following pages.

II

THE FOUR STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING ARE NECESSARY PARTIES TO THIS ACTION BECAUSE THEY ARE PARTIES TO THE COLORADO RIVER COMPACT, THE MEANING AND EFFECT OF WHICH ARE IN CONTROVERSY IN THIS CASE, AND NO DECREE CONSTRUING THAT AGREEMENT CAN BE FULLY EFFECTIVE WHICH DOES NOT DETERMINE THEIR RIGHTS AND OBLIGATIONS AS WELL AS THOSE OF THE PRESENT PARTIES.

A. Both the rights of the absent States, as areas in part within the Upper Basin, and the obligations of those States, as the four "States of the Upper Division," are controlled by the language of the Colorado River Compact which determines the rights and obligations of the present parties.

The obligations of the States of the Upper Division are stated in Articles III(c), III(d) and III(e). The greater portion of the waters in controversy in the Lower Basin reach that Basin through the operation of those Articles.

The rights of the Upper Basin, like those of the Lower Basin, are stated in Articles III(a), III(e), III(f) and III(g). The quantities reaching the Lower Basin are directly affected by the quantities which the Upper Basin may have a right to use.

The obligations and the rights of all the States are affected by Articles VII and VIII.

The rights and obligations of the absent States are defined in the same terms, and in some cases in the same sentence, as the rights and obligations which are in dispute among the present parties, as is developed below.

B. The States of the Upper Division are affected by the question of whether the apportionment made to the Lower Basin by Article III(a) is identified with the covenant of the States of the Upper Division in Article III(d) not to deplete the flow at Lee Ferry below a total of 75,000,000 acre-feet in each period of ten consecutive years, or whether the "rights which may now exist" to uses on the Gila River and other Lower Basin tributaries shall be charged against the Lower Basin's apportionment under Article III(a).

This question depends upon the resolution of two others:

(a) Are the uses of the waters of the Gila River System and other Lower Basin tributaries chargeable at all to the apportionment made by Article III(a) to the Lower Basin?

(b) If uses on the tributaries are chargeable under Article III(a), what is their magnitude?

These two questions were primarily responsible for Arizona's refusal to ratify the Compact for twenty-two years, and they go to the heart of the present controversy.

The contending views are as follows:

California asserts that the waters of the Gila River System are part of the Colorado River System as defined by Article II(a) and of the Lower Basin as defined by Article II(g), (California's Answer to Arizona's Complaint, par. 7, p. 9); that uses under "rights which may now exist" to the waters of the Gila River System are chargeable under Article III(a) of the Compact to the Lower Basin and to Arizona, (*id.*, par. 8, pp. 11, 12); and that such uses amount to not less than 2,000,000 acre-feet per annum (*id.*, par. 8, p. 12).

Arizona asserts that the apportionment made by Article III(a) to the Lower Basin is of the use of waters present in the main stream and measured at Lee Ferry (Reply to California's Answer, par. 8, p. 16), and "that the 75,000,000 acre-feet specified in Article III(d) bears a direct quantitative relationship to the 7,500,000 acre-feet per year apportioned to the Lower Basin by Article III(a)"

(Reply to California's Answer, par. 11, p. 18)[1]. She alleges that the first million acre-feet of uses on the Gila (measured by her depletion method) are chargeable under Article III(b), not III(a) (*id.*, par. 8, p. 17), and that only the excess, which she now says is 170,000 acre-feet, is chargeable under III(a). (*Id*).

The net effect of Arizona's contentions is to read the Gila River System out of the Compact insofar as Article III(a) is concerned. (Arizona also reads the Gila out of the Colorado River System insofar as the Mexican burden is concerned: Reply to California's Answer, par. 10, p. 17.)

The effect of this issue upon the obligations of the four

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[1] Arizona's present position on this point reverses that which she presented to this Court in *Arizona* v. *California, et al.*, 283 U.S. 423 (1931), in which her counsel said (Brief of Complainant in Opposition to Motions to Dismiss the Bill of Complaint, p. 32; Appendix 28 to California's Answer to Arizona's Complaint in the instant suit, pp. 397, 398):

"The provision in paragraph (d) of Article III that the Upper Basin States will not cause the flow of the river to be depleted below 75,000,000 acre-feet over ten-year periods, has, as the Colorado brief, page 41, correctly states, no bearing on the amount of the apportionment to the Lower Basin. This 75,000,000 acre-feet is not apportioned to the Lower Basin. It may not be appropriated in the Lower Basin. Only so much of it may be appropriated as together with existing and future appropriations of water in or from tributaries entering the river below Lee Ferry will total 7,500,000 acre-feet per year. The 75,000,000 acre-feet includes all surplus waters which under paragraph (c) must first bear any Mexican burden, which may not be appropriated, and which are subject to apportionment after 1963. It is fundamental to an understanding of the Compact that the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water apportioned by it to the Lower Basin includes all beneficial consumptive use in perpetuity which may be made from the whole river system, and is not merely an apportionment of such uses in main stream water flowing at Lee Ferry. The agreement not to deplete the flow at Lee Ferry below the specified amount does not mean, and cannot under the plain words of the Compact be construed to mean, that the guaranteed flow is apportioned to the Lower Basin or may be appropriated there. As to this, at least, there can be no shadow of doubt."

absent States under Articles III(c) and III(d), as States of the Upper Division, is as follows:

If the uses of Arizona on the tributaries are chargeable at all to the Lower Basin's apportionment under Article III(a), it follows that, even if they are measured under Arizona's theory at only approximately 1,000,000 acre-feet, the 75,000,000 acre-feet received by the Lower Basin in a ten-year period at Lee Ferry must include at least 10,000,000 acre-feet of waters other than those the use of which is apportioned to the Lower Basin by Article III(a), because manifestly the Lower Basin cannot claim this ten million acre-feet twice under Article III(a), once on the tributaries and a second time at Lee Ferry. The States of the Upper Division, in the calculation of their obligation under Article III(c), are thus directly affected by the question of whether or not the uses on the Gila River and other Lower Basin tributaries are accountable under Article III(a), quite aside from the question of how such uses are measured.

That being so, the States of the Upper Division are affected by the magnitude assigned to the uses on the Lower Basin tributaries. California asserts that such uses amount to at least two million acre-feet per annum on the Gila River System; Arizona says they are less than 1,200,000.[2] This represents a difference of another 8,000,000 to 10,000,000 acre-feet in 10 years in the classification of the uses of the waters arriving at Lee Ferry.

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[2] Compare this contention, also, with Arizona's assertions in *Arizona* v. *California, et al.*, 283 U.S. 423 (1931), particularly par. XIV of the bill of complaint (reprinted in Appendix 28 to California's answer, p. 389):

> "(3) Said compact defines the term 'Colorado River System' so as to include therein the Gila River and its tributaries, of which the total flow, aggregating 3,000,000 acre-feet of water annually, was appropriated and put to beneficial use prior to June 25, 1929."

The dispute over the magnitude of the uses on the Gila is part of the more general dispute as to how beneficial consumptive uses shall be measured, (II-D, *infra*).

C. The States of the Upper Division are affected by the question of whether the provision of Article VIII that "present perfected rights are unimpaired by this Compact" means unimpaired as to quality as well as quantity.

The parties' contentions are as follows:

California alleges (Answer to Arizona's Complaint, par. 15, p. 17), that the protection of this language extends to quality as well as quantity; Arizona says that the provision relates only to quantity (Reply to California's Answer, par. 15, p. 20).

Each State alleges the existence of large "present perfected rights." California alleges that, as of June 25, 1929, her rights of that category exceeded 4,950,000 acre-feet per annum (Answer to Arizona's Complaint, par. 28, p. 29), measured by diversions less return flow. Arizona admits that California had constructed projects as of June 25, 1929 which required a "net main stream depletion of about 2,902,000 acre-feet of water per annum" (Reply to California's Answer, par. 28, p. 26). Arizona alleges that in 1922, 73,000 acres were irrigated in that State from the main stream of the Colorado River. (*Id.*, par. 4, p. 14).

That there were large "present perfected rights" to the use of main stream water in the Lower Basin is attested by Article VIII of the Compact and Section 6 of the Boulder Canyon Project Act, directing that the dam and reservoir be used, among other purposes, for the protection of such rights.

The effect of this issue upon the absent States is as follows:

It is a question of fact, to be developed at the trial, what effect the increased utilization of water in the Upper Basin will have upon the concentration of salts in the

residue reaching Lee Ferry. The present concentration equals somewhat less than one ton of salts per acre-foot of water. What the effect will be, due to increased uses of water in the Upper Basin, and whether transmountain diversions will have a greater effect on the quality at Lee Ferry than in-basin consumptive uses, are matters to be determined. How much increase in salinity the projects in the Lower Basin with "perfected rights" can stand without affecting the yield and types of crops which have been grown are other factors to be considered.

The absent States are thus affected by the questions of whether Article VIII protects "present perfected rights" with respect to quality as well as quantity, what the magnitude of such rights in the Lower Basin may be, and the effect that the covenant that such "present perfected rights shall remain unimpaired by the Colorado River Compact" may have upon the rights and obligations of the absent States.

D. The rights of the Upper Basin are affected by the controversy over the interpretation of the expression "beneficial consumptive use".

The expression "beneficial consumptive use" occurs in Articles III(a) and III(b). Its meaning affects both basins.

Four definitions of this expression have been advanced:

California says (par. 8 of Answer to Arizona's Complaint) that the meaning of this term in the Compact is the same as that defined in section 4(a) of the Boulder Canyon Project Act:

> ". . . aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River . . . ."

which, California says, is amplified in the Mexican Water Treaty Article 1(j) as follows:

> " 'Consumptive use' means the use of water by evaporation, plant transpiration or other manner whereby

> the water is consumed and does not return to its source of supply. In general it is measured by the amount of water diverted less the part thereof which returns to the stream." (See Appendix 29.)

California says that this was the meaning of that term as used throughout the Compact (Answer to Arizona's Complaint, par. 8, p. 12.)

Arizona says (Complaint, par. XXII) that:

> ". . . beneficial consumptive use is measured in terms of main stream depletion, that is, the quantity of water which constitutes the depletion of the stream by the activities of man."

Nevada says (Petition of Intervention, par. XVIII) in substance, that the rule of "diversion less return flow" applies generally subject to an exception in favor of the "main stream depletion theory" on certain tributaries.

The four absent States of Colorado, New Mexico, Utah and Wyoming, together with Arizona, have provisionally agreed in the Upper Colorado River Basin Compact (63 Stat. 31; Appendix 30):

"ARTICLE VI

> "The Commission shall determine the quantity of the consumptive use of water, which use is apportioned by Article III hereof, for the Upper Basin and for each State of the Upper Basin by the inflow-outflow method in terms of the man-made depletion of the virgin flow at Lee Ferry, unless the Commission, by unanimous action, shall adopt a different method of determination."[1]

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[1] See Report of the House Committee on Public Lands, No. 270, on H.R. 2325, 81st Cong., 1st Sess. (1949), an act granting the consent of Congress to the Upper Colorado River Basin Compact (63 Stat. 31): "It is recognized that the Upper Colorado River Basin Compact is binding only upon the States which are signatory thereto and does not impair any rights of any State not signatory thereto, and that the Upper Colorado River Basin Com-

The "spread" of figures produced by these various methods is of the order of two million acre-feet per annum, as to the entire Basin, and three to five hundred thousand acre-feet as to the Upper Basin.[2]

The four absent States are affected by this issue in the calculation of their own rights to use water under Article III(a). The formula which they have provisionally adopted in Article VI of the Upper Colorado River Basin Compact does not bind the States of the Lower Basin or the United States. They are also affected by this issue in the calculation of their obligations as "States of the Upper Division" under Articles III(c) and III(d), *supra,* because these obligations are affected by the quantities of use of "surplus" waters above the quantities specified in Articles III(a) and III(b), both in the Lower Basin and the Upper Basin, which must be yielded before the added obligation of the States of the Upper Division under Article III(c) comes into force. The quantities in fact beneficially consumed, measured at the place of use, are greater than the resulting depletion of the virgin flow of the main stream. This is particularly true in the Lower Basin. The magnitude of the uses chargeable to the Lower Basin is consequently greater, if calculated in terms of actual consumption at the places of use, than if calculated in terms of resulting depletion of the virgin flow of the main stream.

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pact is subject, in all respects, to the provisions and limitations contained in the Colorado River Compact. It is further recognized that Congress, by giving its consent to the Upper Colorado River Basin Compact, does not commit the United States to any interpretation of the Colorado River Compact expressed in, or implied from, the Upper Colorado River Basin Compact, and expresses neither agreement nor disagreement with any such interpretation."

[2] As to the figures applicable to the Lower Basin, see "Summary of the Controversy": Exhibit A to the Answer of the California Defendants to the Petition of Intervention of the United States, and to the present motion. As to the figures respecting the Upper Basin, see Record, UPPER COLORADO RIVER BASIN COMPACT; Proceedings of July 8, 1948, p. 58.

We do not think that four sets of books should be kept on uses in the Colorado River Basin, one under the Colorado River compact, one under the Boulder Canyon Project Act, one under the Upper Basin compact, and one under the Treaty. We think one rule applies, and that the treaty, in Article 1, fairly states it.

There are other serious questions involved in the interpretation of the expression "beneficial consumptive use." For example, if water is stored in a reservoir and later released and used, shall the charge for that use be made in the year in which the water was stored (on the theory that the use, in the sense of "depletion" of the river's flow, took place in that year), or made in the year of release and actual consumption? The four absent States maintain the former interpretation (Hearings, House Committee on Public Lands, H.R. 2325, 81st Cong., 1st Sess., (1949), pp. 57-58, question 6(b); Appendix 31 to California's Answer, Vol. II). California asserts the latter construction. The difference is important, because water is added to storage in plentiful years and is withdrawn in years of short supply, and the identification of the "use" with the one year or the other seriously affects the determination of the quantities of "surplus" waters used.

The term "beneficial consumptive use," applied by the Compact in common to both Basins, must be given a uniform interpretation and application in both.

E. The Upper Basin is affected by the question of whether beneficial consumptive uses of "salvaged water", i.e., water salvaged by the activities of man, which would be lost in a state of nature, shall be charged under the Colorado River Compact.

This question is not necessarily controlled by the question of whether consumptive use shall be calculated in terms of actual use at place of use or calculated in terms of main stream depletion of virgin flow. The question here is whether any charge at all shall be made, under either theory, for the use of water salvaged by man which

would have been lost to the Colorado River System in a state of nature. Arizona cites, as an example, the Gila River, which she says was a "losing stream" in a state of nature. (Complaint, par. XXII, p. 26.) Other examples occur on the main stream, on which there were large evaporation losses from such areas as the Palo Verde Valley, Parker Valley and Yuma Valley in a state of nature, but where such water is now conserved and used; so also with respect to the flood waters on the tributaries and the main stream which escaped in a state of nature but were salvaged by the construction of storage dams, such as Roosevelt Dam on the Gila System and Hoover Dam on the main stream.

The present parties have advanced three contentions; the absent States may advance others.

Arizona contends that "water salvaged by man is not chargeable as a beneficial consumptive use" (Complaint, par. XXII, p. 26), although she charges California with the use of flood waters salvaged by storage behind Hoover Dam, which otherwise wasted to the Gulf of California.

California contends that "no beneficial consumptive uses at places of use are excepted or exempt from said method of measurement, whether of natural flow or of water salvaged by storage or otherwise in any part of the basin." (Answer to Arizona's Complaint, par. 8, p. 12).

Nevada contends that the use of waters salvaged on certain tributaries is not chargeable (Petition of Intervention of Nevada, par. XVIII, p. 20), either under the depletion theory (p. 20) or the diversion-less-return-flow theory.

This issue involves the absent States in two ways:

As this question involves the interpretation of "beneficial consumptive use," an expression common to both basins, the determination of the accounting for the use of waters salvaged by man must apply uniformly to both basins.

The question of whether the use of salvaged water shall be charged under the Compact, in either basin, affects the total of the uses chargeable in the entire Colorado River

Basin under paragraphs (a) and (b) of Article III, and therefore affects the amount of "surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III, available to support the Mexican Treaty burden before the States of the Upper Division are required to increase their deliveries under Article III (c) at Lee Ferry.

F. The Upper Basin is affected by the question of whether the Compact term "per annum" means "each year", or an average over some unstated period of years.

Both Articles III(a) and III(b) refer to quantities in terms of uses "per annum." The problem is whether the apportionment made by Article III(a) to the Upper Basin reserves to that Basin, against appropriations in the Lower Basin, the right to a maximum of 7,500,000 acre-feet in any given year, or a right to an annual average of that quantity over some long period of time. The latter is more advantageous to the Upper Basin and disadvantageous to the Lower. Very large amounts of water are affected by this question.

The contentions of the States are as follows:

The four absent States have asserted a right to use, as water apportioned by Article III(a), aggregate quantities which, averaged over a 32-year period, would equal 7,500,000 acre-feet per annum, notwithstanding that the annual uses which make up this 32-year total would exceed 7,500,000 acre-feet per annum in 17 of the 32 years, and that such excess use would amount to as much as 2 million acre-feet in individual years.[1]

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[1](i) The right to calculate the apportionment on an average basis was asserted by the negotiators of the Upper Colorado River Basin Compact, without translating their assertion into figures, in the hearings of the House Committee on Public Lands on H.R. 2325 *et al.*, 81st Cong., 1st Sess., (1949), p. 57. (Answer to question No. 3.)

(ii) The result of this contention, in figures, appears in "Colorado River Storage Project and Participating Projects, Upper

California's contention is that the quantities specified in Articles III(a) and III(b) relate to the aggregate annual uses in each calendar year, considering each year separately. The result is that if the Upper Basin uses more than 7,500,000 acre-feet in a given year, it is using water above that apportioned to it by Article III(a), and if the Lower Basin uses more than 8,500,000 acre-feet in any given year it is using water in excess of that apportioned by Article III(a) and surplus to that permitted by Article III(b). The right to use that excess or surplus is not founded on the apportionment made by Article III(a), but upon appropriation of such excess or surplus waters (using the word "appropriation" here, as elsewhere in this brief, to include the acquisition of rights by contract with the United States to the use of waters stored by the United States). California construes "per annum" like "per hour" in a speed limit, and denies the right of either Basin to use, as "apportioned" in perpetuity, a quantity in excess of 7,500,000 acre-feet in a given year merely because that Basin, in some other year, used less than that quantity.[2]

Colorado River Basin"; U.S. Bureau of Reclamation, December 1950; H. Doc. 364, 83d Cong., 2d Sess., (1954), p. 152: (Table captioned "Determination of active storage requirement to permit full utilization of apportioned consumptive use"). Column 2 of that Table, captioned "Ultimate use of upper basin apportionment", shows uses by proposed Upper Basin projects of more than 7,500,000 acre-feet in each of the 17 years corresponding to the historical years 1914, 1916, 1917, 1918, 1920, 1921, 1922, 1923, 1926, 1927, 1928, 1929, 1930, 1932, 1938, 1941, and 1942, ranging from an excess of 90,000 acre-feet in a year like 1930 to an excess of 2,030,000 acre-feet in a year like 1917. The aggregate use in these 17 years, in excess of 7,500,000 acre-feet per annum, is 15,680,000 acre-feet, and the average excess for each of the 17 years is 920,000 acre-feet. The average excess for the whole 32-year period is 490,000 acre-feet per annum.

[2] The expression used in Section 4(a) of the Boulder Canyon Project Act is "aggregate annual consumptive use". The water delivery contracts made under that Act refer to delivery of specified quantities "each year". This is true with respect to the Government's water delivery contracts in California (Ap-

Arizona apparently agrees with this in principle, but contends that, as a parctical matter, measurement of uses must be "averaged," and that the issue has not yet arisen. (Reply to California's Answer, par. 8, p. 17.)

If California is correct, the absent States are relying, in the planning of their projects, on a misinterpretation of the Compact which, with respect to this point alone, would unlawfully add several hundred thousand acre-feet per annum to their supply, and correspondingly diminish the supply to which the Lower Basin is lawfully entitled.

The expression "per annum" must be given a uniform interpretation in both of the Basins to which the one expression refers.

G. The Upper Basin is affected by the question of whether, and how, rights may be acquired in either Basin to the use of waters surplus to those specified in Articles III(a) and III(b) of the Compact.

Two widely conflicting views on this question have been stated.

California asserts that pursuant to its Statutory Compact with the United States rights may be presently acquired in such surplus waters by appropriation, including contracts with the United States where such waters have been stored by the United States, and that this right likewise exists under the Compact and applies in the Upper Basin States, subject to the priority of earlier appropriations and earlier contracts in the Lower Basin. (Answer to Arizona's Complaint, par. 27, p. 28; par. 13, p. 16.)

Arizona (Complaint, par. XI, p. 17; Prayer, par. 4, p. 30; Reply to California's Answer, par. 13, pp. 18-19) as-

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pendixes 11, 13, 16, 19, 21, 23 to the Answer of the California Defendants to Arizona's Bill of Complaint), Arizona (Exhibit C to Arizona's Bill of Complaint), and Nevada (Appendixes VI(A), VI(B) to Petition of Intervention of the United States). The guaranteed delivery to Mexico is 1,500,000 acre-feet "annually", "a year", (Mexican Water Treaty, Art. 10; Appendix 29, Vol. II).

serts that no rights may be acquired in such surplus waters except as the result of a new compact to be made after October 1, 1963.

The issue affects the absent States in several ways:

If the Compact should be held, as California contends, to apportion to the Upper Basin the beneficial consumptive use of only 7,500,000 acre-feet in each calendar year, and not a long-term average of that amount, the right of the Upper Basin to the beneficial consumptive use of more than 7,500,000 acre-feet in any one calendar year is dependent upon the establishment of a right thereto by appropriation and use, not by apportionment under Article III(a). But Arizona (Complaint, par. XI; Reply to California's Answer, par. 57) and Nevada (Petition of Intervention, par. XX) deny the existence of any present right to acquire rights in unapportioned waters. A question of fact exists as to whether all such surplus waters which the Upper Basin might attempt to use have already been appropriated or contracted for in the Lower Basin or dedicated to Mexico by treaty. (See California's Answer to Arizona's Complaint, par. 46, p. 52; par. 47, p. 53; Answer to Nevada's Petition of Intervention, par. 5, p. 5; Answer to Petition of Intervention of the United States, par. 15-17, pp. 29-31.)

California contends that the Compact was intended when written in 1922 to insulate the Upper Basin against the law of appropriation, applied regardless of State lines (*Wyoming* v. *Colorado*, 259 U. S. 419 (1922)) only to the extent of a permanent right to make beneficial consumptive use of 7,500,000 acre-feet per annum. All other waters must come down the river, unless appropriated for beneficial consumptive use in the Upper Basin in competition with the Lower, for they are either subject to the apportionment made to the Lower Basin by Article III(a), or to the Lower Basin's right to increase its use by 1,000,000 acre-feet per annum, or to the dedication of 1,500,000 acre-feet a year made by the Mexican Water Treaty to Mexico,

or to appropriations long since made in the Lower Basin of all other waters in excess of those apportioned by Article III(a).

H. The Upper Basin is affected by the question of whether the increase of use permitted to the Lower Basin by Article III(b) is an apportionment in perpetuity as against the Upper Basin, or whether the Lower Basin's right to that million acre-feet, as against the Upper Basin, is dependent upon appropriation and use.

The contentions advanced to date are as follows:

California alleges that the language of Article III(b) does not constitute an apportionment to the Lower Basin, which remains good in pereptuity against the Upper Basin regardless of non-use, as does the apportionment made in Article III(a), but that the "right to increase its use" given the Lower Basin becomes effective only to the extent that appropriations, including contracts with the United States for the use of water stored by the United States, are made; that only upon making such appropriations, and not until then, does the right become vested in users in the Lower Basin (Answer to Arizona's Complaint, par. 9, p. 13); and that the first million acre-feet so committed in excess of 7,500,000 in any year, throughout the Lower Basin, is covered by this permission. It follows that if such rights have not been exercised by the time the Upper Basin becomes entitled under Articles III(f) and III(g) to demand a further apportionment, the uncommitted portion of this million acre-feet becomes available for further apportionment upon demand of the Upper Basin, as a part of the waters unapportioned by the Colorado River Compact (Cf. Sec. 4(a) of the Boulder Canyon Project Act).

Arizona now alleges that the use of the acre-feet referred to in Article III(b) is apportioned by the Compact in perpetuity to the Lower Basin, but is identified with the waters of the Gila River, which are physically avail-

able only to Arizona and New Mexico[1] (Reply to California's Answer, par. 9, p. 17).

Nevada asserts that increases of use throughout the Lower Basin are accountable under Article III(b) and are available to all five States in that Basin upon an agreement among such States (Petition of Intervention, par. VIII, p. 13), but that Article III(b) constitutes an apportionment by the Compact to the Lower Basin (*id.*, par. X, pp. 14-15).

The issue affects the Upper Basin with respect to the quantities of water which will be available for reapportionment under Article III(f). If the uses referred to in Article III(b) are "apportioned," that million acre-feet will not be subject to reapportionment in favor of the Upper Basin, even if unused. But if the Lower Basin's right thereto is dependent upon appropriation, not apportionment, the portion unappropriated will be subject to reapportionment, like other surplus waters unapportioned by the Compact.

I. The absent States are affected by the issue of the accounting for reservoir evaporation losses.

There are a number of contentions on this issue.

Arizona contends (Reply to California's Answer, p. 50):

> "Losses of water in and from reservoirs located in the Lower Basin on the main stream of the Colorado River shall be charged against the apportionment to Arizona and California respectively in the same proportion as the consumptive use of water delivered from storage in such Reservoirs in the State against which the charge is made currently bears to the total consumptive use in the Lower Basin of water delivered from storage in such Reservoir."

This would exclude Nevada from any charge for reservoir losses on Lake Mead.

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[1] Compare with Arizona's contentions in *Arizona* v. *California, et al.*, 283 U.S. 423 (1931); Appendix 28 to California's Answer, p. 398, 399.

California contends that the limitation imposed by the Statutory Compact is stated in quantities "for use in California," and

> "Said Statutory Compact does not provide for the reduction of said quantities in consequence of reservoir, evaporation or other losses occurring prior to delivery of said waters at the points of diversion in California." (Answer to Arizona's Bill of Complaint, par. 27(f), pp. 27-28.)

Nevada contends that

> "evaportion losses of water from storage reservoirs on the main stream of the Colorado River in the Lower Basin are first chargeable out of excess or surplus water and that such evaporation losses are not chargeable against Article III(a) or III(b) waters unless and until all such available excess or surplus water is exhausted in any given year." (Petition of Intervention, par. XVIII, p. 21.)

The four absent States apparently contend that all reservoir losses in the Upper Basin, whether on the main stream or tributaries, are chargeable against the uses apportioned by Article III(a) of the Colorado River Compact. (Upper Colorado River Basin Compact, Art. V; Appendix 30.)

It is not known what position the United States will take as to the accounting for reservoir evaporation losses attributable to federal claims to water, *e.g.*, for the service of Indian rights, performance of the Mexican Water Treaty, navigation, flood control, power generation, etc.

The quantities of reservoir evaporation losses involved are of the order of two million acre-feet per annum, somewhat more than one-half being in the Lower Basin. As this question arises in connection with the definition of "beneficial consumptive use" in Article III(a) and III(b), and affects obligations under Articles III(c) and III(d), it is an issue common to both Basins.

J. The Upper Basin is affected by the question of whether rights of Indians, and uses under these and other federal claims of rights, are chargeable against the apportionments made by the Colorado River Compact, or are excluded therefrom by Article VII.

This question, which concerns the absent States as much as the States now parties to this suit, is discussed, *infra*, in connection with the necessity of the presence of these States as parties to the adjudication of the federal claims to the waters of the Colorado River System.

K. Language in the Colorado River Compact applicable to both Basins must be given the same interpretation as to both, and the decree in this case interpreting such language as to the Lower Basin must, to be effective, operate throughout the Upper Basin as well as the Lower. This requires that the four absent parties to the Compact be made parties to this action.

The Colorado River Compact, like other interstate compacts, is a contract between states. *Green* v. *Biddle*, 8 Wheat. 1 (U. S. 1823). Parties to the compact are bound by joint obligations, and have rights as joint obligees.

The settlement of the controversy between the present parties to the suit, Arizona, California, Nevada and the United States, can only be made by a decree determining provisions of the Colorado River Compact definitive of Lower Basin rights and obligations which by the same language must conversely be definitive of rights in the Upper Basin and obligations of the Upper Division States. If the Upper Basin States of Colorado, New Mexico, Utah and Wyoming, as parties to the Colorado River Compact, are not made parties to the suit, no settlement of Lower Basin rights can be final and effective. Under the applicable law they must be joined.

(1) Signatories to the Compact must be joined.

The absent States are necessary parties merely as signatories to the Colorado River Compact now in controversy.

Following the general tests for necessary or indispens-

able parties set forth in the leading case of *Shields* v. *Barrow,* 17 How. 130 (U. S. 1855) the courts have given them specific application to situations where contract rights of absent parties are involved in the controversy before the court. The *Shields* case itself determined that in a suit to rescind a contract, all parties to the contract are indispensable to the suit, as the rights of an absent party to the instrument could not be adjudicated in his absence.

Similarly, a general rule that all parties to the contract in issue must be joined as necessary or indispensable parties has been followed where the question was not one of the very existence of the Contract, as in the *Shields* rescission case, but one of interpretation of respective rights and obligations under the contract in issue. *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U. S. 77 (1920); *Gregory* v. *Stetson,* 133 U. S. 579 (1890); Cf. *Mallow* v. *Hinde,* 12 Wheat. 193 (U. S. 1827).

In *National Licorice Co.* v. *N.L.R.B.,* 309 U. S. 350 (1940) the court stated the rule and its reason:

> "Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it. . . . Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present." (p. 363).

Accord see *Gauss* v. *Kirk,* 198 F. 2d 83, 84 (D. C. Cir. 1952).

(2) PARTIES HAVING INTERDEPENDENT RIGHTS AND OBLIGATIONS UNDER THE COMPACT MUST BE JOINED.

The States of Colorado, New Mexico, Utah and Wyoming are more than mere parties to a contract in dispute, as their rights under the Colorado River Compact are jointly stated with the rights of the Lower Basin States and controlled by the same language so that any determination of Lower Basin rights pursuant to the Compact would con-

versely determine rights in the Upper Basin. Moreover, the obligations of the absent States as States of the Upper Division, are so interdependent with the rights of the Lower Basin States that the interests of one group cannot be defined and adjudicated without affecting the interests of the other.

In *Commonwealth Trust of Pittsburgh* v. *Smith,* 266 U. S. 152 (1924) the State of Idaho entered into a contract with an irrigation company whereby the company was to build irrigation works and provide the requisite water supply to settlers, selling to each settler water rights all on the same plane of equal priority, not in excess of the available water supply. The company in turn entered into contract with settlers of reclaimed land to sell water rights to a common water supply. All contracts between the company and the settlers were of the same tenor, but each was separate and distinct. In an action by the holder of the company contracts against only two of the settlers for nonpayment under their contracts, the Court held that all were necessary parties, saying:

> "The bill sets forth the controversy respecting the water supply and does so for the purpose of having it determined. The controversy is not peculiar to the contracts sued on but reaches and affects all that are outstanding. The contracts, while several in form, are interdependent in substance and operation. All are effectively tied together by the contract between the State and the company, in virtue of which they were made ,and by what they purport to do, which is to entitle their holders to participate on equal terms in the use of a common supply of water and to invest them with proportionate interests in the works by which the water is collected and conducted to the places of use." (p. 159).

Then the lower court judge was quoted with approval as follows:

> "In a very substantial sense all the settlers are parties to one general contract, in the subject matter of which

> all are interested and by virtue of which all have rights so interdependent, whether they be regarded as joint or several, that the interest of one cannot be defined and adjudicated without affecting the interests of the other."

The courts have uniformly required the joinder of absent persons subject to the courts' jurisdiction having a community of interest with the litigation at bar. *Independent Wireless Telegraph Co.* v. *Radio Corp. of America,* 269 U. S. 459 (1926); *Metropolis Theatre Co.* v. *Barkhausen,* 170 F. 2d 481 (7th Cir. 1948), *cert. denied,* 336 U. S. 945 (1949); *Franz* v. *Buder,* 11 F. 2d 854 (8th Cir. 1926), *cert. denied* 273 U. S. 756 (1927); *West* v. *Randall,* 29 Fed. Cas. 718, No. 17,424. (C.C.R.I. 1820).

(3) All parties having interests in Colorado River System waters must be joined.

The subject matter of the controversy—*i.e.,* the use of the water of the Colorado River System—would make all of the States of the Colorado River Basin necessary parties to the suit, even if the rights asserted bore no relationship to a Compact in which the rights of the States are interdependently stated. Arizona recognized this fact in her previous suits in this Court in which she named all of the other Colorado River Basin States as defendants. *Arizona* v. *California, Colorado, Nevada, New Mexico, Utah, Wyoming, and Wilbur, Secretary of the Interior,* 283 U. S. 423 (1931); *Arizona* v. *California, Colorado, Nevada, New Mexico, Utah, Wyoming and Ickes, Secretary of the Interior,* 292 U. S. 341 (1934); *Arizona* v. *California, Colorado, Nevada, New Mexico, Utah and Wyoming,* 298 U. S. 558 (1936). The legal principles are well recognized.

In *California* v. *Southern Pacific Co.,* 157 U. S. 229 (1895) the Court held absent parties to be indispensable (and consequently ousted the court of original jurisdiction) even though they were involved in real estate transactions distinctly separate from the litigated transactions. How-

ever, because the validity of all the transactions turned on common questions of law, the Court felt that any decree issued would be hollow in the absence of all the parties to the other transactions. After conceding that the decree technically would not be binding on the absent parties as *res judicata,* the Court said:

> ". . . it is impossible to ignore the inquiry whether the interests of parties not before the court would be so affected and the controversy so left open to future litigation as would be inconsistent with equity and good conscience." (p. 255).

Similarly in *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199 (1902) the Court held that in order to judge the rights of the Northern Securities Company to exercise control over two parallel and competing railroads in Minnesota, the rights of the two absent railroads were necessarily involved, making them indispensable parties. In the present suit an adjudication of rights of the Lower Basin States to Colorado River System water would necessarily control the remaining rights of the Upper Basin States to System waters.

In *Railroad Company* v. *Orr, 18 Wall.* 471 (U. S. 1873) certain bondholders brought suit for an accounting and foreclosure of the mortgaged property. All of the bondholders named in the indenture agreement were not joined as parties. The court noted from the bill that the mortgaged property was probably inadequate to pay all of the bond claims purporting to be secured by it, and held the absent bondholders necessary parties to the suit, stating:

> ". . . all persons who have any material interest in the subject of the litigation should be joined as parties . . . "It is the interest of every bondholder to diminish the debt of every other bondholder. Insofar as he succeeds in doing that, he adds to his own security. Each holder, therefore, should be present, both that he may defend his own claims and that he may attack the other claims should there be just occasion for it." (pp. 474, 475).

These principles concerning parties have been applied to the Colorado River. In *Arizona* v. *California et al.*, 298 U. S. 558 (1936) Arizona joined all of the States of the Colorado River Basin, but not the United States, in a suit seeking to quiet title to rights to the permanent use of a certain portion of the waters of the Colorado River. It was argued by Arizona that under the applicable law, the rights of the United States were not involved as they were subject, and secondary, to the right of Arizona to an equitable share in the unappropriated waters. The Court held, however, that this contention could not be judicially determined in a proceeding to which the United States was not a party, and in which it could not be heard. The Court went further to state:

> "Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California* v. *Southern Pacific Co.*, 157 U. S. 229, 251, 257; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 245-247; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 606; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 163". (pp. 571-572).

Upon the same principles the absent States of Colorado, New Mexico, Utah and Wyoming are necessary parties to the present suit.

III

NEW MEXICO AND UTAH ARE NECESSARY PARTIES TO THIS ACTION BECAUSE THEY ARE STATES WHICH ARE IN PART WITHIN THE LOWER BASIN, IN ADDITION TO THE REASONS WHICH MAKE THEM NECESSARY PARTIES AS STATES OF THE UPPER DIVISION AND OF THE UPPER BASIN.

A. New Mexico, Utah, Arizona, California and Nevada have undivided interests under the Colorado River Compact in the "common fund" of water available to the Lower Basin.

The Colorado River Compact defines the Lower Basin in terms which include portions of New Mexico and Utah, as well as portions of Arizona, California and Nevada. (Article II(g).)

The Colorado River Compact makes no allocation among the five States of the uses of water available to the Lower Basin as a whole, and they have not agreed upon an allocation. (The relation of the Statutory Compact between the United States and California to this question is discussed later in this brief.)

The rights of Arizona, California and Nevada cannot be determined without concurrently determining the rights of New Mexico and Utah in the "common fund" of water available under the Colorado River Compact to five States of the Lower Basin. (California's Answer to Arizona's Complaint, par. 61, p. 64; par. 63, p. 66.)

B. The meaning and effect of the Colorado River Compact and the Boulder Canyon Project Act are in controversy in respects which specifically affect New Mexico and Utah as States which are in part within the Lower Basin.

(1) There is controversy as to whether the "rights which may now exist" to the use of the waters of the Virgin River in Nevada and Utah, and the Little Colorado River in New Mexico and Arizona (streams which enter the main stream below Lee Ferry) are accountable under, and protected by, Article III(a) of the Compact. California as-

serts the affirmative. (Answer to Arizona's Complaint, par. 8, p. 12.) Arizona says that all uses under Article III(a) are to be taken from water flowing at Lee Ferry. (Reply to California's Answer, par. 8, p. 16.)

(2) There is controversy as to whether the "rights which may now exist" to the use of the waters of the Gila River System in New Mexico are accountable under, and protected by, Article III(a) of the Compact. California asserts that they are. Arizona says they are not, but are covered by Article III(b). (Reply to California's Answer, par. 8, 9, pp. 16, 17.)

(3) There is controversy as to whether Nevada's share in any class of water has been determined. Nevada asserts that they have not (Petition, par. XII), Arizona that they have (Answer to Nevada's Petition, par. 12).

(4) There is controversy as to whether rights to the "increase of use" under Article III(b) may be acquired by appropriation (including contracts with the United States with respect to water stored by it), as California contends (Answer to Arizona's Complaint, par. 9, p. 13), or only by agreement among the five States in the Lower Basin, as Nevada contends (Petition of Intervention, par. VIII, pp. 13, 14; par. XVIII, p. 19).

(5) There is controversy as to whether the burden of the Mexican Water Treaty on the Lower Basin, in case "surplus" above the aggregate of the quantities specified in Articles III(a) and III(b) is not sufficient to meet it, falls first on the uses covered by Article III(b) as California contends (Answer to Arizona's Complaint, par. 10, p. 14), or on the uses covered by Article III(a), as Arizona contends (Reply to California's Answer, par. 10, p. 18).

(6) There is controversy as to whether the term "beneficial consumptive use" shall be given a different meaning on the tributary systems, including the Virgin and Gila Rivers, than on the main stream. The affirmative is as-

serted by Arizona (Complaint, par. XXII, p. 26) and Nevada (Petition of Intervention, par. XVIII, p. 20), the negative by California (Answer to Arizona's Complaint, par. 8, p. 12).

C. The meaning and effect of the Statutory Compact between the United States and California, evidenced by the Boulder Canyon Project Act and the California Limitation Act, are in controversy in respects which specifically affect New Mexico and Utah as States which are in part within the Lower Basin.

(1) There is controversy as to whether California is excluded by the terms of the Statutory Compact from participation in the increase of use permitted to the Lower Basin by Article III(b) of the Compact. Arizona asserts the affirmative (Complaint, par. XXII, p. 25). The negative is asserted by California (Answer to Arizona's Complaint, par. 27, p. 27), and Nevada (Petition of Intervention, par. XVIII, p. 20).

(2) There is controversy as to whether the right of the Lower Basin to the increase of use permitted by Article III(b) relates to all water of the Colorado River System in the Lower Basin as is asserted by California (Answer to Arizona's Complaint, par. 9, p. 13; par. 63, p. 66) and Nevada (Petition of Intervention, par. XIV, p. 18; par. XVIII, p. 20), or whether this right is limited to the waters of the Gila River and is available only to Arizona and New Mexico, as Arizona contends, excluding not only California but Nevada and Utah. (Reply to California's Answer, par. 9, p. 17).

(3) There is controversy as to the availability of "surplus" waters for use in the Lower Basin under the Statutory Compact, and the rights of the five States to make use of it.

D. Arizona is not authorized to speak for or commit New Mexico or Utah.

Arizona's purported recognition of the rights of New Mexico and Utah (Complaint, Prayer, p. 30), based upon Arizona's interpretation of the Compact, does not bind those States, (see also Nevada's Petition of Intervention, par. XIII(b), p. 16). New Mexico and Utah may or may not agree with Arizona's interpreations of the Compact and of their rights thereunder, and in any event those rights must be determined either by decree of this Court or interstate compact. Arizona's asserted willingness to negotiate an agreement with these two States has not materialized in any compact with them in the past 32 years.

E. The controversy as to the rights and obligations of the Lower Basin cannot be effectively resolved in the presence of only three, and the absence of two, of the five States sharing those rights and obligations.

The States of New Mexico and Utah, as States lying in part within the Lower Basin, participate in undetermined amounts in the right to beneficial consumptive use of a "common fund" of water available for use in the Lower Basin under under the Colorado River Compact. As such their interests require their joinder as necessary parties for an effective settlement of the presnt controversy.

A case in point is *Williams* v. *Bankhead*, 19 Wall. 563 (U. S. 1874). There a specific fund of money was in dispute. An absent party who claimed an interest in the fund was held indispensable to the action by the court on the basis that any decree disposing of the fund would directly affect her interest therein. Similarly in *United States* v. *Bank of New York & Trust Company*, 296 U. S. 463 (1936), involving specific funds, the court stated:

> " . . . there are numerous persons whose claims in relation to these funds are in the course of adjudication. . . . they are entitled to be heard and they are indispensable parties to any proceeding for the disposition of the property involved." (p. 480)

The absent States of New Mexico and Utah are entitled to be heard on their undefined rights to the common fund of Lower Basin water, and conversely if they are not joined, a determination among the present parties of Lower Basin rights would be subject to later disruption in any subsequent litigation by them. As stated by the court in *Barney* v. *Baltimore,* 6 Wall. 280 (U. S. 1868) in holding absent co-heirs indispensable to an action for partition brought by one of the heirs:

> "If a decree is made, which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them, the court cannot for that very reason afford the relief asked, to the other parties." (p. 285)

See also *Russell* v. *Clark's Executors,* 7 Cranch 69 (U. S. 1812); *Franz* v. *Buder,* 11 F. 2d 854 (8th Cir. 1926), *cert. denied* 273 U. S. 756 (1927); *Young* v. *Powell,* 179 F. 2d 147 (5th Cir. 1950), *cert. denied* 339 U. S. 948.

Accordingly, the States of Utah and New Mexico must be joined as parties to the suit to give complete relief to the present parties with respect to the water available to the Lower Basin.

IV

THE FOUR ABSENT STATES ARE NECESSARY PARTIES TO THIS ACTION IN THEIR CAPACITY AS THIRD PARTY BENEFICIARIES OF THE STATUTORY COMPACT BETWEEN THE UNITED STATES AND CALIFORNIA EVIDENCED BY THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA LIMITATION ACT.

A. The continued existence of the Statutory Compact as a necessary accompaniment to a Six-State Colorado River Compact may not be determined in the absence of all parties to the contract.

The allegation by Arizona that she ratified the Colorado River Compact in 1944, thus creating a Seven-State Compact, is in issue. This raises the question of whether the

Statutory Compact between the United States and California, wherein California agreed to certain limitations upon her uses for the benefit of Colorado, New Mexico, Utah and Wyoming (as well as the present parties of Nevada and Arizona), remained in effect if Arizona should be held to have effectively ratified the Compact. This question can only be decided if all the parties to the Six-State Compact are joined to the suit. *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855); *Northern Indiana R.R.* v. *Michigan Central R.R.,* 15 How. 233 (U.S. 1854); *Ward* v. *Deavers,* 203 F. 2d 72 (D.C. Cir. 1953); *Metropolis Theatre Co.* v. *Barkhausen,* 170 F. 2d 481 (7th Cir. 1948), *cert. denied,* 336 U.S. 945 (1949); *Lawrence* v. *Sun Oil Co.,* 166 F. 2d 466 (5th Cir. 1948); *Vincent Oil Co.* v. *Gulf Refining Co.,* 195 Fed. 434 (5th Cir. 1912); *Kleinschmidt* v. *Kleinschmidt Laboratories, Inc.,* 89 F. Supp. 869 (N.D. Ill. 1950); *see Roos* v. *Texas Co.,* 23 F. 2d 171, 172 (2d Cir. 1927), *cert. denied,* 277 U. S. 587 (1928). In *Shields* v. *Barrow,* the case in which this Court formulated the classic definitions of necessary and indispensable parties, it was held that all parties to a contract are indispensable in an action for the rescission of that contract.

B. The four absent States are necessary parties to Arizona's suit because all joint beneficiaries of a contract must be joined in an action by any one of them to determine the obligations of the promisor.

California made a single promise in the California Limitation Act, pursuant to the Boulder Canyon Project Act, for the joint benefit of all six of the other States in the Colorado River Basin. The United States is the other principal to that agreement. The present controversy among Arizona, California, Nevada and the United States raises issues of interpretation affecting the rights of the four absent beneficiaries—Colorado, New Mexico, Utah and Wyoming. All six joint beneficiaries must be parties to the action if these issues are to be resolved.

It is well established that in an action by a joint obligee against the obligor, all joint obligees are necessary parties and also are indispensable when indispensability is in issue. *Farni* v. *Tesson,* 1 Black 309 (U. S. 1862); *Fremon* v. *W. A. Sheaffer Pen Co.,* 209 F. 2d 627 (8th Cir. 1954); *National City Bank* v. *Harbin Electric Joint-Stock Co.,* 28 F. 2d 468 (9th Cir. 1928); *Roos* v. *Texas Co.,* 23 F. 2d 171 (2d Cir. 1927), *cert. denied,* 277 U. S. 587 (1928); *Himes* v. *Schmehl,* 257 Fed. 69 (3d Cir. 1919); *Edgell* v. *Felder,* 84 Fed. 69 (5th Cir. 1897); *McAulay* v. *Moody,* 185 Fed. 144 (C. C. Ore. 1911). The rule is designed to protect the obligor from possible harassment and multiplicity of suits upon his single promise or duty. Any determination of California's rights and obligations under the Statutory Compact in the present suit would be open to later disruption in a subsequent suit by any one of the absent beneficiaries — Colorado, New Mexico, Utah or Wyoming.

While third party beneficiaries technically are not promisees, where they hold joint rights they must be treated like joint obligees for the purpose of compulsory joinder. 4 CORBIN, CONTRACTS, Sec. 940 (1951); RESTATEMENT, CONTRACTS, Sec. 129, Comment *a* (1932).

The absent States of Colorado, New Mexico, Utah and Wyoming are necessary parties to any action to interpret or enforce the Statutory Compact between the United States and California.

V

THE FOUR ABSENT STATES ARE NECESSARY PARTIES TO THE ADJUDICATION OF THE CLAIMS OF THE UNITED STATES TO THE WATERS OF THE COLORADO RIVER SYSTEM.

A. The claims which the United States asserts "as against the parties to this cause, to the use of waters of the Colorado River and its tributaries" are equally claims as against all the States of the Colorado River Basin.

The following claims asserted by the United States "as against the parties to this cause" affect the four absent States:

(1) To supply all projects in the Lower Basin (Petition of Intervention of the United States, par. XXX, p. 25); but it is admitted that the requirements of these projects exceed the quantity of water available to that Basin under Articles III(a) and III(b) of the Compact (Petition, par. XXXIII, p. 33). This involves, therefore, an adjudication of the right of the United States in the Lower Basin, as against the Upper, to store and contract for the delivery of quantities of water surplus to the quantities specified in those articles. The Government's contracts require, for their performance, nearly 8,500,000 acre-feet per annum from the main stream alone (Petition, par. XV, p. 14; par. XVIII, p. 17; par. XIX, p. 17), beside the uses on the Gila (par. XXIV, p. 22) and the "diversion rights" of 1,747,250 acre-feet per annum for Indians (par. XXVII, Appendix IIA). The Government asserts that all its contracts are valid (Petition, par. XXXI(a), p. 27).

(2) To fulfill obligations arising from international treaties and conventions. (Petition of Intervention par. XXX, p. 25). This involves:

(a) The obligations of the States of the Upper Division under Article III(c) and III(d) of the Colorado River Compact, and

(b) The effect on Compact rights and obligations of the so-called "escape clause" of Article 10 of the Mexican Water Treaty, which allows reduction in the annual guaranteed delivery to Mexico, in the event of extraordinary drought, in the same proportion as consumptive uses in the United States are reduced, "consumptive uses" being defined in Article 1 of the Treaty.

(3) To fulfill the Government's obligations to Indians and Indian tribes (Petition, Par. XXX, p. 25). This involves:

(a) The magnitude and priority of these claims. The United States is understood to reserve the right under paragraphs XXVII (p. 23) and XXXVII (p. 39) of its Petition of Intervention to assert that Indian rights are prior and superior to those of all other claimants to the waters of the Colorado River System.

(b) The question of whether or not uses under Indian rights are chargeable to the Basin and the State in which they occur. The United States is understood to reserve the right, under the language of paragraphs XVII (p. 23) and XXXVII (p. 38) of its Petition of Intervention, to assert that Indian uses and rights are not covered at all by the Colorado River Compact, but constitute uses outside of (as well as superior to) the quantities of uses referred to in the Compact. Arizona's position upon this point is ambiguous (Reply to California's Answer, par. 14, p. 19). All other States in the Basin assert, in effect, that Indian uses and other federal uses are chargeable under the Compact to the Basin and State in which they occur. (California, Answer to Arizona's Complaint, par. 14, p. 16; Nevada, Petition of Intervention, par. XV, p. 18; Upper Colorado River Basin Compact (63 Stat. 31, Appendix 30, Art. VII.)

(c) What the obligation of the Upper Division States may be to release water for use by Indians in the Lower Basin, and

(d) What rights the United States may have to withhold water in reservoirs in the Upper Basin for use by Indians in both Basins.

(4) To protect its interests in fish and wildlife, flood control and navigation. (Petition, par. XXX, p. 25.) This involves:

(a) The impounding and release of water from reservoirs in both Basins, and not merely reservoirs bordering or within Arizona, Nevada and California, and

(b) The question of accounting under the Compact.

(5) For use of the National Park Service, Bureau of Land Management, and Forest Service; but if the United States has claims "as against the parties of this cause" for these functions, it has similar claims to all the waters of the Colorado River System.

B. The claims which the United States asserts involve questions of law common to all the States of the Colorado River Basin.

These include:

(1) The power of the United States to impound and dispose of water independently of rights derived from the States;

(2) The extent of its obligations under treaties and contracts, and the impact thereof upon rights of domestic water users;

(3) How its claims to the use of water shall be measured;

(4) The extent to which its rights and obligations are controlled by the Colorado River Compact;

(5) The extent to which its claims may be exercised *in futuro* in derogation of intervening rights and uses.

C. Certain of the claims of the United States, if sustained, and held to be outside of the Compact, may render the Colorado River Compact incapable of operation.

(1) If the uses of Indians throughout the Colorado River Basin are not chargeable against beneficial consumptive uses under the Colorado River Compact, and are held to be prior and superior in right to the uses which are chargeable, there may not be sufficient water in the entire Colorado River System to service those claims and the Mexican Water Treaty, and to sustain the uses contemplated by the Compact;

(2) So also with the undefined claims for use by the Bureau of Land Management and the Forest Service, which, together, administer substantially all of the public lands in the Colorado River Basin.

D. The claims of the United States to the waters of the Colorado River System cannot be effectively adjudicated in the absence of four States which have rights and obligations with respect to the waters of that System.

The claims of the United States are asserted independently of the Colorado River Compact. If they are sustained to the use of Colorado River System waters, the interests of the absent States in the System waters will be materially affected, for rights would be decreed not only to the Lower Basin's Compact share of water, but to the additional amounts requested by the Federal Government, which could come only from the whole River System. Under the doctrine of the *Shields* case (17 How. 130 (U. S. 1854)) the absent States would hence qualify as indispensable parties.

The fact that when claims to Colorado River System water are asserted independently of the Colorado River Compact, all parties having an interest in the System waters must be joined, was recognized by Arizona in the first three cases of *Arizona* v. *California* where the States of Colorado, New Mexico, Nevada, Utah and Wyoming were joined as defendants with California. 283 U. S. 423 (1931); 292 U. S. 341 (1934); 298 U. S. 558 (1936).

In *Nebraska* v. *Wyoming*, 295 U. S. 40 (1935), Wyoming moved to dismiss Nebraska's Bill of Complaint on the ground, among others, that the State of Colorado was an indispensable party to Nebraska's suit for an equitable apportionment against Wyoming of the North Platte River. No interstate compact or statutory compact existed on the North Platte River and the only allegation in the Bill of Complaint touching Colorado was that the river in question had its source in Colorado. The court, looking to the Bill of Complaint, held that Colorado was not an indispensable party merely because of the allegation that the North Platte River arises in that State and drains a considerable area therein; more than that allegation of fact would be necessary. The court said further, however:

> "We need not determine whether Colorado would be a proper party, or whether at a later stage of the cause pleadings or proofs may disclose a necessity to bring her into the suit."

A Master was appointed. 296 U. S. 542 (1935). Subsequently Wyoming filed an Amended and Supplemental Answer alleging the State of Colorado to be a necessary and indispensable party. The allegations were that thirty per cent of the waters in controversy originated in Colorado, that Colorado and its citizens threatened the diversion of a large quantity of water, that defendant would be subject to further litigation if Colorado were not made a party, and that a fair allocation of water could not be made upon any basis without at the same time determining the rights of Colorado. (Amended and Supplemental Answer, paragraph Twentieth, filed Nov. 30,

1935.) This Court, on the basis of these allegations, ordered that Colorado be made a party. 296 U.S. 553 (1935). The final decree adjudicated the rights of all three States and the United States, which had intervened, even though Colorado had taken the position she should be dismissed. *Nebraska* v. *Wyoming and Colorado,* 325 U. S. 589 (1945).

The claims of the United States in the present case, like the claims of *Nebraska* in *Nebraska* v. *Wyoming and Colorado,* asserted in both cases independently of any Compact, cannot be adjudicated piecemeal against the lower States in the absence of the upper States.

VI

CONCLUSION.

The States of Colorado, New Mexico, Utah and Wyoming are necessary parties in the pending case of *Arizona* v. *California et al.,* and must be joined as such for a full and effective settlement of the controversy in that case. They are necessary because they are parties to the Colorado River Compact, because they, together with Arizona and Nevada, are beneficiaries of the Statutory Compact between the United States and California evidenced by the Boulder Canyon Project Act and the California Limitation Act, and because the claims of the United States affect all of the waters of the Colorado River System. New Mexico and Utah are necessary parties for the additional reason that they have interests in the Lower Basin in common with Arizona, California and Nevada.

For all these reasons the motion to join these four States as parties should be granted.

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